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No. 87-825

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHEL L. TILLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Lt. Col., OJAG, USAF

MORRIS A. TANNER, JR.
Lt. Col., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Headquarters, United States Air Force
Bolling Air Force Base
Washington, D.C. 20332-6128

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Petitioner claims that his court-martial panel was improperly selected.

1. Following a general court-martial at the Rhein-Main Air Base in West Germany, petitioner, an enlisted member of the United States Air Force, was convicted of unpremeditated murder, in violation of Article 118(2) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918(2). He was sentenced to 18 years' confinement, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review (Pet. App. 8a-13a) and the Court of Military Appeals (Pet. App. 1a-6a; 25 M.J. 20) affirmed.

Article 25(d)(2) of the UCMJ, 10 U.S.C. 825(d)(2), establishes the procedure for the selection of court-martial panel members. It directs the court-martial convening authority to select "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service,

and judicial temperament."[1] Before the court-martial panel is assembled, the convening authority is free to add, delete, or substitute panel members. Arts. 25, and 29, UCMJ, 10 U.S.C. (& Supp. IV) 825, and 829.

In this case, an assistant staff judge advocate at the Rhein-Main Air Base, Captain Secours, prepared a list of 25 potential court-martial panel members (AX 1).[2] Captain Secours had participated at a pretrial hearing on the issue whether petitioner should be confined pending trial. That list was forwarded by a letter dated March 19, 1984, to the special court-martial convening authority over the signature of Captain Sweet, who served as an assistant prosecutor in petitioner's case (*ibid.*). Captain Sweet's only involvement in the process of selecting the names of the potential court-martial members was the ministerial act of signing the letter (R. 12). The special court-martial convening authority in turn forwarded the 25 names to the general court-martial convening authority by a letter dated March 19, 1984. The general court-martial convening authority thereafter selected nine panel members from that list. Pet. App. 9a-10a.

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[1] A "convening authority" is a commander who is authorized to convene a court-martial pursuant to Articles 22-24 of the UCMJ, 10 U.S.C. (& Supp. IV) 822-824, and Rule for Courts-Martial 504, *Manual for Courts-Martial, United States—1984 (Manual).* The duties of the convening authority include the selection and appointment of court-martial panel members (a practice commonly known as "detailing" members of a court-martial), directing that the defendant be tried by the court-martial for the charged offense (a practice commonly known as the "referral" of charges to a court-martial), and conducting a post-trial review of the proceedings. See Arts. 25, 34, and 60, UCMJ, 10 U.S.C. (& Supp. IV) 825, 834, and 860; see also Rules 503, 601, and 1107, *Manual.*

[2] The commander at Rhein-Main exercises special court-martial jurisdiction. General court-martial jurisdiction is exercised by the commander of the 17th Air Force at Sembach Air Force Base in West Germany.

In a pre-trial motion, petitioner challenged the prosecutors' participation in the process of recommending court-martial panel members and sought the appointment of a new panel (AX 1). In order to avoid any appearance of impropriety, the convening authority granted petitioner's motion and directed the staff judge advocate to prepare a new list from which the convening authority could select another panel (Pet. App. 10a). The staff judge advocate directed Captain Parkhill, who had no prior involvement in petitioner's case, to prepare the new list (*ibid.*; R. 17).

Captain Parkhill then obtained a list of the officers who were assigned to the base. From that list, Captain Parkhill deleted the names of the officers who would be unavailable to serve at trial, those who had some knowledge of the case, and those who had been on the first list. That process resulted in a second list of 15 recommended officers (R. 18, 21, 24-25).[3] After having background data sheets completed on those 15 officers, Captain Parkhill forwarded their names and the background information to the special court-martial convening authority. The special court-martial convening authority, in turn, forwarded the list to the general court-martial convening authority along with his recommendations as to which members should be selected (AX 3).

Captain Parkhill subsequently determined that three officers from the original list of 25 were also available to

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[3] Petitioner complains (Pet. 5) that Captain Parkhill had at least a casual knowledge of the 15 persons he recommended to the convening authority. That is hardly surprising, however, since there are only some 300-400 officers assigned to the base and since Captain Parkhill had served there for three years (R. 22, 25). In any event, Captain Parkhill was in the process of recommending members having the qualifications prescribed by Article 25(d)(2) of the UCMJ, and he could not make appropriate recommendations without some knowledge about the persons he listed.

serve on the court-martial panel (R. 20). He forwarded those three names to the staff judge advocate of the general court-martial convening authority by a letter dated May 30, 1984. Colonel McGovern, one of the three officers named in Captain Parkhill's letter, was among the officers selected by the convening authority for petitioner's court-martial panel. The convening authority, however, obtained Colonel McGovern's name from another source, not from Captain Parkhill's letter. Colonel Horton, a second officer whose name had been on the first list, was also chosen for the court-martial panel assigned to petitioner's case. Colonel Horton's name had not been listed in Captain Parkhill's letter and thus, like Colonel McGovern's name, was obtained from another source. See AX 2, at 8; AX 4, at 10.

At trial, petitioner contended that the presence of Colonels Horton and McGovern on his court-martial panel gave rise to an appearance of impropriety. Petitioner also challenged them for cause based on the allegedly defective selection procedure. The trial judge found no appearance of impropriety and denied petitioner's for-cause challenge (R. 31, 37).

2. Petitioner's claim is quite narrow. He does not contend that the court-martial panel selection process adopted by Congress and authorized by Article 25(d)(2), 10 U.S.C. 825(d)(2), is unconstitutional. Nor does he claim that either Colonel Horton or Colonel McGovern was biased in any way. Instead, petitioner argues that their presence on his court-martial panel gave rise to an appearance of impropriety because they were named on the original list of recommended panel members that was forwarded to the convening authority over the assistant prosecutor's signature. That fact-bound claim does not warrant review by this Court.

Even if there was some flaw in the original selection process,[4] it was cured by the process used to select the second panel—the one that actually heard petitioner's case. That panel was not selected from the list prepared by the assistant prosecutor. Rather, it was selected from the new list prepared by an assistant staff judge advocate who was not involved in the prosecution and from other sources considered by the convening authority. That fact that two officers who had been on the original list of proposed panel members were also on the second list of proposed panel members did not taint the process that was used to obtain that list, since the convening authority was free to select names from any source and was not in any way dependent upon, or directed by, the contents of the first list. Although the convening authority selected the names of two officers who had been on that list, the convening authority did not choose them from that list or from Captain Parkhill's letter. Thus, even on petitioner's assump-

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[4] Prior military decisions have emphasized the distinction between purely ministerial actions performed by a prosecutor during the court-martial panel selection process and a more substantive involvement in recommending the selection of panel members. Only the latter, the military courts have held, invalidates the selection process. Compare *United States* v. *Sax*, 19 C.M.R. 826, 836-838 (A.F.B.R. 1954) (trial counsel's signature on letter recommending court members so it could be sent to convening authority did not invalidate selection process), with *United States* v. *Cook*, 18 C.M.R. 715 (A.F.B.R. 1954) (selection of court-martial panel members by prosecutor held invalid). The prosecuting attorney's involvement in the selection process was purely ministerial; it consisted simply of forwarding over her signature a letter containing a list of recommended panel members. The list was prepared by someone else, an assistant staff judge advocate whose only involvement in the case was at a pretrial confinement hearing. It is not clear whether petitioner challenges that attorney's participation in the process of selecting the court-martial members. In any event, for the reasons given in the text, that attorney's participation was ultimately rendered immaterial once the new list was prepared for the convening authority by Captain Parkhill.

tion that the first list was somehow tainted, the convening authority's process of selecting court-martial members was not in any way affected by the method by which that list was compiled.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Lt. Col., OJAG, USAF

MORRIS A. TANNER, JR.
Lt. Col., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate
Counsel Division

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[5] Petitioner suggests in passing (Pet. 8) that there is something more generally amiss about permitting staff judge advocates to select the list of proposed court-martial members, even when the assistant staff judge advocate who composes the list is not involved in the prosecution. Petitioner, however, did not make that argument to the trial court and thus has waived it.

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